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No. 99-977

IN THE
Supreme Court of the United States

ELEANOR SEBASTIAN, *et al.*,
Petitioners,

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF *AMICI CURIAE* OF THE RETIRED OFFICERS ASSOCIATION AND TWENTY-NINE OTHER UNIFORMED SERVICES AND VETERANS ORGANIZATIONS IN SUPPORT OF PETITIONERS

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The Retired Officers Association and twenty-nine other uniformed services and veterans organizations file this brief [1] *amici curiae* in support of Petitioners and urge this Court to grant the petition for a writ of certiorari and

[1] Counsel for petitioners and respondent have consented to the filing of this brief. Their letters of consent have been filed with the Clerk in accordance with Rule 37.2. In accordance with Rule 37.6, disclosure is hereby made that no counsel for a party authored this brief in whole or in part and that no monetary contributions were made to the preparation or submission of this brief other than by *amici curiae*, their members or their counsel.

reverse the decision of the United States Court of Appeals for the Federal Circuit.

INTEREST OF *AMICI*

Amici are The Retired Officers Association (TROA) and twenty-nine other uniformed services and veterans organizations which comprise The Military Coalition.[2] TROA is a not-for-profit corporation that is dedicated to serving and protecting the interests of past and present, active, reserve and retired commissioned and warrant officers in all seven of the uniformed services. Founded in 1929, TROA now has a membership of approximately 393,000 current and former officers and their survivors. TROA's mission is to support a strong national defense and to represent its members' interests before Congress and, on rare and extreme occasions, before courts of the United States.

The twenty-nine other uniformed services and veterans organizations have a combined membership of over 3,600,000 current and former members of the uniformed services of the United States. Some of these organizations are focused on the interests of certain specializations within the uniformed services (e.g., the Military Chaplains Association; the Association of Military Surgeons of the United States); some focus on particular branches of military service (e.g., the Air Force Association; the Association of the U.S. Army; the Marine Corps League; the Fleet Reserve Association; U.S. Coast Guard Chief Petty Officers Association; U.S. Army Warrant Officers Association; Commissioned Officers Association of the U.S. Public Health Service). Some of these organizations are of relatively recent origin (e.g., the Enlisted Association

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[2] A complete listing and description of the organizations joining in this brief appear as Appendix A to this brief.

of the National Guard of the United States (founded in 1970); the National Order of the Battlefield Commissions (founded in 1978); the National Military Family Association (founded in 1969)); some have been championing the cause of the military services for a century or more (e.g., the Jewish War Veterans of the USA (founded in 1896); the National Guard Association of the United States (founded in 1878)).

Each of the thirty uniformed services and veterans organizations that has joined in this brief shares one common interest: they stand together to ensure that those men and women who have risked, and in some cases sacrificed, their lives in defense of the United States of America are treated with fairness and accorded the respect and dignity their service has earned. They join together in this brief because, as the decision of the United States Court of Appeals for the Federal Circuit demonstrates, military veterans and their spouses have become the victims of broken promises made by the Government as an inducement to serve their country through a career in the uniformed services. The benefits promised were fully earned by Petitioners and millions of other similarly situated veterans before the Government's unconscionable taking.

Because the Federal Circuit and other lower courts are ignoring this Court's precedent, these organizations urge this Court to reverse the decision of the court below and to reestablish the importance of the principle that promises made by the Government in consideration for a career of dedicated service must be honored.

REASONS FOR GRANTING THE PETITION

This case presents an issue of profound importance to millions of aging military career veterans and the surviving spouses of their deceased comrades in arms. In an age of ever-rising medical expenses and hospital care, the United States government abruptly reversed a centuries-old practice of providing free medical care to these veterans when they are most in need of this promised care and can least afford these services.

The very integrity of the Government is at stake when an express promise, relied upon by millions in choosing to serve their country throughout their careers in the uniformed services, suddenly is abrogated during retirement, long after such benefits have been earned. Congress itself expressly acknowledged both its "clear moral obligation to provide medical care to retired personnel and their dependents" [3] and its longstanding tradition of providing this benefit.

There is no question that the promise of lifetime medical care was made to Petitioners. Likewise, there is no dispute that the Government recently breached this obligation despite the fact that Petitioners relied upon this benefit in fulfilling their lengthy duty to their country. In responding to this inducement, Petitioners had no reason to question their permanent entitlement to this benefit. Free medical care had been assured to military retirees by custom and tradition [4] since this country's infancy. Thus, at issue in this case is the ability of a faceless, and apparently heartless, Government bureaucracy to renounce a promise made to its own citizenry after full performance

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[3] Report No. 1407, 89th Cong., 2d Sess., at 22.

[4] This Court has expressly recognized that due process claims may arise based upon the policies and practices of an institution. *See Perry v. Sindermann*, 408 U.S. 593, 603 (1972).

had been made through decades of military service to this country.

As previously observed, this country's pledge of retirement benefits to its veterans is not of recent origin. Indeed, General George Washington wrote to the Continental Congress [5] pleading that those who put their lives at risk for the betterment of all of their countrymen should not have their sacrifices be met by the empty promises of an ungrateful nation. Washington was certain, however, that this great Country "will never leave unpaid the debt of gratitude":

> For if, besides the simple payment of their Wages. a farther compensation is not due to the sufferings and sacrifices of the Officers, then have I been mistaken indeed. If the whole Army have not merited whatever a grateful people can bestow, then have I been beguiled by prejudice, and built opinion on the basis of error. If this Country should not in the Event perform every thing which has been requested in the late Memorial to Congress, then will my belief become vain, and the hope that has been excited void of foundation. And [6] "if, (as has been suggested for

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[5] Washington wrote several letters to Congress concerning the need for pay and pensions for his long-suffering troops. *See* Letter from George Washington to Continental Congress Conference Committee (January 29, 1778); Letter from George Washington to Continental Congress (October 11, 1780); Letter from George Washington to Continental Congress (March 18, 1783) (The George Washington Papers at the Library of Congress).

[6] The words Washintgon placed in quotations were an excerpt from an anonymous letter of grievances, known as The Newburgh Address, which was circulated among officers in an army camp located in Newburgh, New York. The officers' complaints included late pay, food and clothing account arrearages, and Congress' failure to enact a life pension of half pay. The letter was written on or about March 10, 1783 and caused near-insurrection until diffused by Washington. Washington began an address to his officers in

> the purpose of inflaming their passions) the Officers of the Army are to be the only sufferers by this re[v]olution; if retiring from the Field, they are to grow old in poverty, wretchedness and contempt. If they are to wade thro' the vile mire of dependency and owe the miserable remnant of that life to charity, which has hitherto been spent in honor," *then shall I have learned what ingratitude is, then shall I have realized a tale, which will imbitter every moment of my future life. But I am under no such apprehensions, a Country rescued by their Arms from impending ruin, will never leave unpaid the debt of gratitude.* (emphasis supplied).

Letter from George Washington to Continental Congress (March 18, 1783) (The George Washington Papers at the Library of Congress).

Permitting an injustice [7] of this magnitude to continue unabated not only is morally reprehensible, but unwise. The Armed Forces today are suffering from the Government's neglect. The vitality of the all-volunteer Armed Forces, present and future, is put further at risk when confronted with Governmental duplicity of the nature disclosed here.

A recent survey of 12,000 members of the military found that military personnel are under "profound stress" and health benefits remain one of their primary concerns:

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response to the inflammatory anonymous letter by reaching for eye spectacles, stating: "My eyes have grown dim in my country's service, *but I never doubted of its justice.*" (emphasis supplied). *See, e.g.*, David Ramsay, *The Life of George Washington*, Ch. IX (1807).

[7] "But when a covenant is made, then to break it is unjust and *the definition of injustice is no other than the not performance of covenant.*" Thomas Hobbes, *Leviathan*, Ch. XV (1651) (emphasis supplied).

> Because members of the all-volunteer military are older on average and more than half of them are married, often to spouses who work outside the home, the questions of pay, housing, health benefits and family stability were at the top of the list of concerns, the survey [8] found.

Elizabeth Becker, *Survey Finds 'Profound Stress' on Armed Forces*, N.Y. TIMES (National Edition), January 10, 2000, at A12.

Society at large benefits when a government honors its obligations to its citizenry and correspondingly suffers from the discontent sowed by a sovereign's breach of faith. This Court has acknowledged that citizens are owed some minimum standard of decency, honor and reliability in dealing with their Government. *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 61 (1984). *See also St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting). It is this fundamental, bedrock obligation of honor and reliability which is at stake in the present case.

It is also imperative that this Court grant review to ensure that inferior courts abide by this Court's controlling law. The lower court in the case at bar failed to adhere to this Court's reasoning in *United States v. Larionoff*, 431 U.S. 864, 879 (1977). The Federal Circuit alluded to "some broad language in *Larionoff*" (Petition App. A at 9a.), but rendered an extremely narrow reading of the case which stripped it of its efficacy.

The holding in *Larionoff* is neither narrow nor novel. It consists of the fundamentally sound legal principle that, once a member of the Armed Forces has already performed services, he or she may not be deprived of "pay

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[8] "American Military Culture in the 21st Century" commissioned by the Center for Strategic and International Studies.

due for services already performed, but still owing," *Larionoff*, 431 U.S. at 879. While acknowledging that changes in pay could be made prospectively, this Court concluded that the prospective repeal of a program could not divest a service member of rights that he or she had already earned. *Id.* It is patent that, in the instant case, Petitioners long ago fully earned the medical benefits of which the Government now has deprived them; precisely the conduct *Larionoff* forbade.

Moreover, the lower court's construction of *Larionoff's* "actual holding" (Petition App. A at 9a.) cannot withstand scrutiny. It reduced this Court's reasoning to a fact-specific finding, unworthy of this Court's discretionary review function, that "the statute repealing the variable re-enlistment bonus did not apply to bonuses promised and extension enlistments made, prior to the statute's effective date." (Petition App. A at 9a.). Accordingly, review by this Court is necessary to ensure the continuing vitality of *Larionoff* and to halt its erosion by lower courts.

CONCLUSION

This Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

The following organizations join in this brief in support of the petition for a writ of certiorari to the United States Court of Appeals for The Federal Circuit:

Air Force Association (AFA)

Founded in 1946. Approximately 150,000 members. Membership in AFA is open to anyone who serves or has served in the U.S. Military. Other American citizens may affiliate as patrons. AFA's mission is to provide public understanding of aerospace power, need to support a strong national defense and to represent needs of men and women who serve and have served in USAF.

Air Force Sergeants Association (AFSA)

Founded in 1961. Approximately 150,000 members. Established to serve as the voice of Air Force enlisted personnel. Membership is open to any active or retired enlisted Air Force, Air Force Reserve and Air National Guard members, and their families.

Army Aviation Association of America (AAAA)

Founded in 1957. Approximately 14,000 members. Membership in AAAA is open to all persons who desire to support the furtherance of U.S. Army Aviation or its allied pursuits.

Association of Military Surgeons of the United States (AMSUS)

Chartered by Congress in 1903. Approximately 11,500 members. Membership is open to past and present commissioned officers or GS-9 and above civilians in the Federal Health Agencies including USA, USAR, USN,

USNR, USAF, USAFR, ARNG, ANG, USPHS, USCG and VA; officers of military medical services of other nations; and past and present medical consultants to the chiefs of the federal medical services. AMSUS' mission is dedicated to the advancement of all aspects of health care within the Federal Health Agencies.

Association of the U.S. Army (AUSA)

Founded in 1950. Approximately 100,000 individual and 240 industrial members. Membership is open to all active, reserve and civilian personnel in the Army, and any persons subscribing to the association's bylaws. The purpose of the organization is to foster public understanding and support of the Army and the people who serve in it.

Commissioned Officers Association of the U.S. Public Health Service (COA)

Founded in 1937. Approximately 6,500 members. Membership is open to active duty, retired, inactive reserve and former commissioned officers of the U.S. Public Health Service. COA's mission is to protect the interests and welfare of commissioned officer of the PHS.

CW & WO Assn. US Coast Guard

Founded in 1929. Approximately 3,000 members. Membership is open to active duty, reserve and retired Coast Guard warrant and chief warrant officers. The association's purpose is to advance members' professional abilities.

Enlisted Association of the National Guard of the U.S. (EANGUS)

Founded in 1970. Approximately 75,000 members. Membership is open to enlisted members of the National

Guard through state associations and associate membership is open to all individuals through state associations. The purpose of the association is to promote and maintain adequate national security; and to foster the status, welfare and professionalism of enlisted members of the National Guard.

Fleet Reserve Association (FRA)

Chartered November 11, 1924. Over 152,000 members plus 20,000 member Ladies Auxiliary. Membership is open to active duty, drilling reserve, and retired enlisted personnel and commissioned officers with prior enlisted service in the Navy, Marine Corps and Coast Guard. FRA's mission is to represent its members on military compensation, benefits and entitlements legislation before Congress.

Gold Star Wives of America, Inc.

Formed in 1945. Approximately 13,000 members. Membership is open to U.S. citizens who are widows of members of the U.S. armed forces who died while in uniform or from service-connected causes. Among other purposes, the organization seeks to inculcate a sense of individual obligation to the community, state and nation; honor those who made the supreme sacrifice for our country; and support and assist surviving family members.

Jewish War Veterans of the USA

Founded in 1896. Approximately 100,000 members. Membership is open to veterans of wartime service of the Jewish faith. The organization's mission is service to veterans, Americanism, and to provide a voice on the Hill for veterans' legislation and benefits.

Marine Corps League (MCL)

Founded in 1923. Approximately 51,000 members. Membership is open to those who served in the Marine Corps. The organization's mission is to preserve the traditions, to promote the interests of the Marine Corps, to voluntarily aid and render assistance to all Marines and former Marines, as well as to their widows and orphans.

Marine Corps Reserve Officers Association (MCROA)

Founded in 1928. Approximately 4,500 members. Membership is open to all Marine officers and officers of other U.S. services who served with Marines. The association's mission is to support and strengthen the Marine Corps, its reserve and reserve officers.

Military Chaplains Association of the USA (MCA)

Founded in 1925 and chartered by Congress in 1950. Approximately 1,600 members. Membership is open to all chaplains of the Army, Navy, Air Force, VA and Civil Air Patrol, active duty, reserve, retired and former. The organization's mission is to safeguard and strengthen the forces of faith and morality of our nation; to perpetuate and deepen the bonds of understanding and friendship in our military services; to preserve spiritual influence and interest in all members and veterans of the armed forces; to uphold the Constitution of the United States; and to promote justice, peace and goodwill.

Military Order of the Purple Heart of the USA (MOPH)

Founded in 1932. Chartered by Congress in 1958. Approximately 39,000 members. Membership open to recipients of the Purple Heart. MOPH's mission (among others) is to a) assist and aid its members and families and b) preserve and defend the United States of America from all enemies whomsoever.

National Guard Association of the United States (NGAUS)

Founded in 1978. Approximately 50,000 members. Membership is open to all present and former officers of the Army and Air National Guard, corporate and individual associate membership. The association's mission is to improve the readiness of the National Guard and to provide personnel benefits and entitlements for the half million members of the National Guard.

National Military Family Association (NMFA)

Founded in 1969. Approximately 18,000 family members. Membership is open to active duty, retired and reserve component members of the seven uniformed services and their family members and survivors. NMFA's mission is to serve military and other uniformed service families through education, information and advocacy.

National Order of The Battlefield Commissions (NOBC)

Founded in 1978. Approximately 1,000 members. Membership is open to any individual of any service who has been Commissioned in the Armed Forces of the United States as a result of combat action. NOBC's mission is to support a strong and responsive national defense by supporting those Americans that follow our flag.

Naval Enlisted Reserve Association (NERA)

Founded in 1957. Approximately 13,000 members. Membership in NERA is open to active and retired enlisted reservists in the Coast Guard, Marine Corps and Navy and to all other interested citizens. NERA is dedicated to promoting and maintaining career service in the Sea Service Reserve.

Naval Reserve Association (NRA)

Founded in 1954. Approximately 24,000 members. Membership in the NRA is open to active, inactive and retired Naval Reserve Officers and its purpose is to maintain and strengthen the nation's defense by ensuring a continued strong Navy and Naval Reserve.

Navy League of the United States (NLUS)

Founded in 1902. Approximately 70,000 members. Membership is open to civilians, military reservists and retirees. The League's mission is to maintain a strong U.S. maritime posture through support of the Navy, Marine Corps, Coast Guard and Merchant Marine.

Reserve Officers Association (ROA)

Organized in 1922 and chartered by Congress in June 1950. Approximately 80,000 members. Originally, the Reserve Officers Association consisted solely of Army officers, Reserve officers, National Guard officers, and retired officers. Following World War II, the Reserve Officers Association expanded its membership to all services.

Society of Medical Consultants to the Armed Forces

Founded following WWII by returning physicians who were determined not to lose the valuable lessons learned in combat medicine and wartime surgery. Approximately 1,000 members. Its membership is open to all active consultants to the Surgeons General and to former members of the Armed Forces medical corps who served as consultants. The Society provides consultation to the Surgeons General supporting quality initiatives, technological advancements with particular interest in combat medicine and surgery.

The Retired Enlisted Association (TREA)

Founded in 1963 and chartered by Congress. Approximately 106,000 members. Membership is open to enlisted retirees from all branches of the service, their surviving spouses and active duty members with over 20 years of service. TREA's mission is to protect earned benefits of retired and career enlisted and their families.

The Retired Officers Association (TROA)

Founded in 1929. Approximately 393,000 members. Membership in TROA is open to all past and present, active, reserve and retired commissioned and warrant officers in any of the seven uniformed services and their survivors. TROA's mission is to support a strong national defense and to represent its members' interests before Congress.

United Armed Forces Association (UAFA)

Founded in 1987. Approximately 20,000 members. Membership is open to E-1 through O-10, Active Duty, Retired, Reserve, National Guard, Veterans of all five uniformed military services. UAFA's mission is to represent the members of the Armed Forces before Congress on legislation matters affecting them.

U.S. Army Warrant Officers Association (USAWO)

Founded in 1973. Approximately 5,000 members. Membership is open to active duty, National Guard, reserve and retired Army warrant officers. USAWO's mission is to recommend improvement of the Army and to promote technical and professional information among warrant officers.

U.S. Coast Guard Chief Petty Officers Association (CPOA)

Founded in 1969. Its 11,000 members are active, retired, and reserve Coast Guard chief petty officers. The mission of the Association is to promote the welfare of chief petty officers, to promote and protect the rights and benefits of all armed forces personnel and aid in Coast Guard recruiting.

Veterans of Foreign Wars of the United States of America (VFW)

Founded in 1899. Approximately 2 million members. Membership is open to all grades and ranks of past and present members of the U.S. armed forces. Eligibility requirements are a discharge under honorable conditions and the award of the Department of Defense authorized campaign or foreign service medal. VFW's missions are fraternal, patriotic, historical, and educational.

Veterans' Widows International Network, Inc.

Founded March, 1995. More than 200 members in 21 states, England, Germany and Korea. Open to all widows of service members.